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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Joint Petition for Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

BRIEF OF HOWARD UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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Howard University submits this brief, as amicus curiae, in support of the petitioners' request that a writ of certiorari issue to review the judgment

of the United States Court of Appeals for the District of Columbia Circuit entered on July 19, 1985.

This brief is filed in accordance with Rule 36.1 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Howard University ("Howard"), which was created by an act of Congress in 1867, is the Federal Communications Commission ("FCC" or "Commission") licensee of Station WHMM-TV. WHMM-TV is a noncommercial educational station broadcasting on UHF Channel 32 in Washington, D.C. As the nation's only television station licensed to a predominantly black university, WHMM-TV provides a substantial amount of programming geared to the special needs and interests

of minority audiences. The station presents a unique set of viewpoints to its multi-ethnic and diverse audience -- viewpoints that otherwise may be given little exposure by broadcasters or programmers generally.[1]

Ever since it began operation in the Fall of 1980, WHMM-TV has vigorously pursued its rights under the FCC's "must carry" rules. Consistent with the rules, the station has sought carriage on each of the several cable systems located in the Washington, D.C. market.[2] WHMM-TV's

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[1] WHMM-TV airs some of the programming offered by the Public Broadcasting Service ("PBS"). However, about 80 percent of WHMM-TV's programming hours are different from those presented by the other Washington, D.C., PBS affiliate, WETA-TV.

[2] These systems provide cable television service to approximately 350,000 households. Arbitron, Audience Estimates in the Arbitron Market of Washington, D.C.; Meter and Diary Measurement at p. Int.-1 (May 1985).

experience with these systems demonstrates that, absent the must carry rules, the station's specialized programming and the substantial diversity it offers will be effectively denied to a significant number of those individuals which the station is licensed to serve.

Indeed, there is not a single cable television system carrying WHMM-TV which was not required to do so under the FCC's rules. Most of these systems commenced carriage of WHMM-TV only after the station had specifically invoked its must carry rights. Several other systems flatly refused to comply with WHMM-TV's carriage requests and to offer their subscribers WHMM-TV programming -- notwithstanding that they devoted channel space to a number of other

Washington, D.C. television stations with which WHMM-TV must compete for viewers. These systems required WHMM-TV to engage in costly and time-consuming litigation before the FCC in order to enforce its rights. One such cable operator, which has successfully avoided carriage of WHMM-TV for nearly five years since a carriage request was initially tendered, is now pursuing its resistance to WHMM-TV before a federal court of appeals.[3]

The refusal of a cable system to carry WHMM-TV is tantamount to blocking the station's access to that system's

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[3] St. Charles CATV, Inc. v. FCC, No. 85-1121 (D.C. Cir., filed Feb. 25, 1985). This case, which also involves constitutional challenges to the must carry rules, has been held in abeyance by the Court of Appeals pending final disposition of the petition for writ of certiorari here.

subscriber base. Because WHMM-TV is a UHF station, its signal is, in most cases, satisfactorily available over-the-air only to households which have installed an outdoor UHF antenna aimed in the direction of WHMM-TV's transmitter (located in Bethesda, Maryland). Cable subscribers are most unlikely to incur the additional expense of installing and maintaining a UHF antenna simply to receive WHMM-TV. In fact, as the FCC has recognized, "One of the standard selling points of CATV [cable] service is the subscriber's ability to dispense with expensive or unsightly outdoor antennas."[4]

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[4] First Report and Order in Docket Nos. 14895, et al., 38 F.C.C. 683, 702 n.25 (1965).

Even if a cable subscriber did maintain a UHF antenna, reception of broadcast signals by cable is technically superior to over-the-air reception of broadcast signals, particularly UHF signals. The result of a cable operator's failure to carry WHMM-TV is that the unique WHMM-TV signal, if available at all in the cable household, will be far inferior to that of the other Washington, D.C. stations which the cable operator has chosen to carry on his system.[5]

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[5] Because of the physical nature of the UHF and VHF bands, there is already a significant technical and economic disparity between UHF stations, such as WHMM-TV, and VHF stations. This disparity, which is a matter of significant Congressional concern, is known as the "UHF handicap." See generally S. Rep. No. 1043, 95th Cong., 2d Sess. 71-2 (1978). Those cable systems that refuse to carry WHMM-TV and at the same time carry WHMM-TV's VHF competitors simply exacerbate the problems associated with the UHF handicap.

In short, the FCC's must carry rules have been a critical component of WHMM-TV's efforts to reach the audience it is licensed to serve. Without these rules, carriage of WHMM-TV will likely be discontinued by those cable operators who consistently have resisted the station and its unique blend of programming; this, in turn, will effectively impede or block altogether WHMM-TV's access to many cable subscribers. Howard thus seeks reversal of the decision below and reinstatement of the FCC's must carry rules.

REASONS FOR GRANTING WRIT OF CERTIORARI

Some twenty years ago the Commission adopted rules requiring cable operators to set aside a portion of their "virtually

unlimited channel capacity" (App., p. 34a)[6] for the carriage of local television signals. The Commission "found that the CATV [cable] system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers." Second Report and Order in Docket Nos. 14895, et al., 2 F.C.C.2d 725, 736 (1966). A principal objective of the must carry rules was, therefore, to ensure that cable operators not impede local broadcasters' access to the audiences which they are licensed to serve under the Communications Act of 1934, 47 U.S.C.

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[6] The abbreviation "App." refers to the Appendix to the "Joint Petition for Writ of Certiorari" filed September 23, 1985 by the National Association of Broadcasters, et al. The above-quoted language is from the decision of the Court below.

§ 151 et seq.[7]

The constitutionality of the "must carry" rules was upheld by the United States Court of Appeals for the Eighth Circuit in Black Hills Video Corp. v. FCC, 399 F.2d 65 (1968). And in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), this Court affirmed the Commission's authority to adopt must carry rules because they promote the Communications Act objectives of program diversity and localism. See United States v. Midwest Video Corp.,

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[7] See First Report and Order in Docket Nos. 14895, et al., 38 F.C.C. 683, 702 (1965); Cable Television Report and Order, 36 F.C.C.2d 143, 173 (1972), on reconsideration, 36 F.C.C.2d 326 (1972), aff'd sub nom. American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975); J.C. Smith, Primer on the Regulatory Development of CATV, 18 How. L.J. 729, 736-47 (1975).

406 U.S. 649 (1972) (upholding Commission's authority to require origination of programming by cable operators). More recently, in Capital Cities Cable, Inc. v. Crisp, ____ U.S. ____, 104 S. Ct. 2694 (1984), this Court found that the must carry rules serve an "important and substantial federal interest" which justifies preemption of conflicting state regulation. 104 S. Ct. at 2708.

In the decision below, however, a panel of the United States Court of Appeals for the District of Columbia Circuit (Wright, J.) took a different view of the must carry rules. The lower Court concluded that the rules 1) do not in fact serve a "substantial or important governmental interest" (App., pp. 41a-52a), and 2) are

"grossly overinclusive" because they do not discriminate among those local stations which should and should not be carried according to various factors which the Court considers relevant (App., pp.52a -59a). The Court below vacated the must carry rules in their entirety, declaring that they constitute an impermissible interference with cable operators' first amendment right of "editorial discretion."

The decision below should be reviewed by the Supreme Court for the following reasons.

First, Supreme Court review is necessary to resolve the direct conflict between the Eighth Circuit in Black Hills Video Corp. v. FCC, supra, and the District

of Columbia Circuit below concerning the constitutionality of the must carry rules. Moreover, it is necessary to resolve the plain inconsistency between the conclusions reached below and in Capital Cities Cable, Inc. v. Crisp, supra. The rules cannot both serve a substantial governmental interest for purposes of preemption, as this Court concluded in Capital Cities, and at the same time not serve such an interest for purposes of the first amendment, as the lower Court concluded.

Second, Supreme Court review is essential to provide the lower courts with proper guidance concerning the applicablity of the first amendment to cable television. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969), the Supreme Court

concluded: "[D]ifferences in the characteristics of new media justify differences in the first amendment standards applied to them." Because the Supreme Court has never considered the first amendment in the context of cable television (App., p. 19a), substantial confusion already exists as to how the appropriate constitutional standards should be applied, e.g., the conflict between the Eighth Circuit and the District of Columbia Circuit regarding the constitutionality of the must carry rules. See also App., pp. 19a-23a, where the Court below describes the conflicting approaches taken by the courts in first amendment cases involving cable.

It is particularly important that the Supreme Court provide the necessary guidance now because of the multiplicity of pending and threatened lawsuits involving first amendment challenges to a variety of cable regulation.[8] Absent such guidance,

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[8] See F. Lloyd, Cable Litigation: First Amendment Suits Seen Proliferating, in Cable T.V. and New Media, Vol. III, No. 7 at 4-5 (September 1985) (reviewing pending first amendment cable litigation and litigation which likely will be generated as a result of the decision below, including challenges to several portions of the recently enacted Cable Communications Policy Act of 1984, 47 U.S.C. § 501 et seq.)

In addition, a petition has already been filed with the Commission challenging, on the basis of the decision below, the constitutionality of the FCC's cable network nonduplication rules, which require cable operators to delete certain distant signal network programming which simultaneously duplicates that on a local signal. The constitutionality of these rules had previously been upheld in Black Hills Video Corp. v. FCC, supra, and in the following cases which relied upon Black Hills: Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969); Conley Electronics

[Footnote continued on following page]

there is likely to be substantial and potentially wasteful litigation.

Third, Supreme Court review is warranted because this case involves important first amendment issues which affect not only cable operators, but also commercial and noncommercial broadcasters throughout the nation.

The Court below focused its analysis solely upon the first amendment rights of cable operators. As noted above, however,

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[Footnote 8 continued from preceding page] Corp. v. FCC, 394 F.2d 620 (10th Cir.), cert. denied, 393 U.S. 858 (1968); and Titusville Cable TV, Inc. v. United States, 404 F.2d 1187 (3d Cir. 1968). Obviously, the effect of the decision below, unless reversed, will be to reopen in the federal courts many cable issues which had long since been resolved.

the very purpose of the must carry rules is to ensure that cable operators not abuse their natural monopolistic position[9] to impede local broadcasters' access to the audiences which they (the broadcasters) are licensed to serve.[10] This objective has its foundation in Communications Act

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[9] See Omega Satellite Products Co v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) (Posner, J.).

[10] The Court below refused to accord weight to the FCC's expert judgment that must carry rules are necessary to achieve this objective, apparently because it thought the agency's judgment was not based upon empirical evidence. The FCC, however, specifically relied upon its extensive experience in implementing legislation designed to deal with the problems of UHF stations (App. p. 71a); no contrary evidence had ever been presented to the Commission. Furthermore, the Supreme Court has recognized that the "Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations." FCC v. WNCN Listeners Guild, 450 U.S. 568, 594 (1981).

policy, but even more importantly in the first amendment itself. See Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests");[11] Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 387 (The right of free speech "does not embrace a right to snuff out the free speech of others").

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[11] In Associated Press v. United States, supra, a private news organization charged with violation of the antitrust laws for restricting dissemination of news to certain competitors, claimed that the government's enforcement of the antitrust laws (much like enforcement of the must carry rules) violated its first amendment rights. The Supreme Court rejected this claim, concluding that it was appropriate for the government to take necessary steps to preserve the free flow of information.

In adopting the must carry rules, the Commission sought to balance the first amendment rights of broadcasters to reach their local audiences without undue interference, and the rights of cable operators. With its myopic focus upon cable operators' rights alone, the Court below has upset this balance in a manner that relegates to insignificance broadcasters' first amendment concerns. Such an abrupt judicial reversal of a well-entrenched agency regulatory framework, with national and constitutional implications, deserves consideration by this Court.

Finally, Supreme Court review is necessary because the decision below will have a particularly pernicious effect upon

those public broadcasters, such as WHMM-TV, which provide minority-oriented programming. As WHMM-TV's actual experience demonstrates, it is this minority-oriented programming which cable operators will resist offering. Unless reversed by this Court, the decision below will thus frustrate rather than promote the objectives of the first amendment.

The purpose of the first amendment is, of course, to ensure "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v. United States, supra, 326 U.S. at 20. The must carry rules served that purpose. They ensured that cable subscribers had available all local television stations,

without regard to the specific content of the programming on those stations and thus without regard to the popularity or unpopularity of the ideas that might be expressed. Furthermore, compliance with the must carry rules did not in fact foreclose cable operators from offering, and cable subscribers from receiving, any particular programming. As the Court below recognized, cable operators have "virtually unlimited channel capacity" (App., p. 34a); thus, the technology is there to permit carriage of any programming service available to the cable operator, regardless of the number of local signals that must be carried.

This conclusion was plainly evident from the record below.[12]

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[12] There were two petitioners before the lower court -- Quincy Cable TV, Inc. ("Quincy") and Turner Broadcasting Systems, Inc. ("TBS").

Quincy Cable expanded its channel capacity so that it not only was able to carry all of the programming services that it wished along with the must-carry signals; it even had excess channels which were unused. (App., pp. 126a-127a.) And as the Court below noted, Quincy, with the expanded channel capacity, was "willing to carry" all of the local signals. (App., p. 28a n.28.)

With regard to TBS, the lower court, in anecdotal fashion, referred only to statements by Quincy that it would not carry TBS programming if required to comply with the must carry rules. (App., p. 24a n.24.) These statements are contradicted by the facts noted above. Moreover, TBS did not, in its submission to the FCC below requesting a rulemaking proceeding, provide a single example of any actual instance where a cable operator was unable to carry the TBS programming services because of compliance with the must carry rules. In any event, it should be emphasized that the TBS services (the "superstation" WTBS-TV and CNN) reach over 90 percent of the nation's cable households

[Footnote continued on following page]

If, however, the sweeping decision below is not reversed, cable operators will have unfettered discretion to control the programming which reaches their subscribers and thus to deny broadcasters access to the individuals whom they are licensed to serve. The likely result is that cable subscribers will be exposed to only the most commercially marketable programming, or to the programming of those who can afford to pay the cable operators' price for access. In either case, the

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[Footnote 12 continued from preceding page] or approximately 34-35 million cable households (Cablevision, Sept. 9, 1985, at 40) -- more than 100 times the number of cable households potentially available to WHMM-TV. (See note 2, supra.) Clearly, the must carry rules have not, in any meaningful respect, hindered TBS' ability to get its message to the American public.

objectives of the first amendment will be frustrated, and the objectives of the Communications Act to disseminate broadcast signals to the widest possible audience, 47 U.S.C. § 151, will be undermined.

CONCLUSION

The "Joint Petition for Writ of Certiorari" should be granted.

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